IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 535

LEON JOSEPHSON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL A. NEUBURGER,
BARENT TEN EYCK,
Attorneys for the Petitioner.

SAMUEL ROSENWEIN,
Of Counsel.

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INDEX

CITATIONS

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leon Josephson, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered December 9, 1947 (R. 230), affirming a judgment of conviction of the petitioner in the District Court for the Southern District of New York (R. 196).

Statement of the Matter Involved

The petitioner was charged in the indictment (R. 5) with the commission of an offense against the United States, Title 2, United States Code, Section 192. After arraignment and plea (R. 1), petitioner moved before trial to dismiss

the indictment (R. 6-10) upon grounds of constitutional and legal invalidity. The motion to dismiss was denied by the District Court (R. 195) with a written opinion (R. 190-194).

The trial took place before Hon. Alfred C. Coxe, a Judge of the District Court for the Southern District of New York, and a jury, on October 14 and 15, 1947 (R. 2). The motion to dismiss the indictment was renewed at the commencement of the trial (R. 13-45), and denied (R. 45). Motions for a direction of acquittal and dismissal of the indictment were made at the close of the Government's case (R. 91), and denied (R. 92). The same motions were again made at the close of the entire case (R. 125), with the same ruling (R. 126). The jury returned a verdict of guilty (R. 149). Motions for a new trial and in arrest of judgment were denied (R. 149).

The petitioner was sentenced to imprisonment for a period of twelve months and a fine of one thousand dollars (R. 163), on October 15, 1947 (R. 2). Bail was denied by the District Court (R. 163-168), but upon application to the United States Circuit Court of Appeals for the Second Circuit, petitioner was admitted to bail in the sum of $2,500 pending the determination of the appeal. Notice of appeal was filed on October 17, 1947 (R. 2) and amended notice of appeal (R. 197) was filed on October 20, 1947 (R. 2).

The cause was argued before the United States Circuit Court of Appeals for the Second Circuit on November 6, 1947 (R. 201). The decision of the Circuit Court was rendered on December 9, 1947 by a divided Court, Judge Clark dissenting (R. 201-230). Judgment was entered on December 9, 1947 (R. 230).

By stipulation of counsel, and upon the order of Hon. Augustus N. Hand, a Justice of the Circuit Court, dated December 15, 1947, the bail of the petitioner was continued

pending the determination of this application for a writ of certiorari. On December 23, 1947, Mr. Justice JACKSON extended the time for filing a petition for writ of certiorari until January 20, 1948 (R. 231).

The House Committee on Un-American Activities as presently constituted was established by Section 121(q)(1) of the Legislative Reorganization Act of 1946, Public Law 601, 79th Cong., 2d Sess., Ch. 753, which was later adopted as a Rule of the House on January 3, 1947 (H. Res. 5, 93 Cong. Rec. 36).[1] As the prosecutor stated at the trial, Public Law 601 is "the law creating this committee, and under which it acts, and which defines its scope" (R. 90).

On March 5, 1947, the petitioner appeared in New York City before a sub-committee of the Committee on Un-American Activities (R. 56). Before he was sworn, he stated that he wished "to make a motion contesting the constitutionality" of the Committee (Deft.'s Exh. A-1, R. 177; 99). The Chairman inquired whether he refused to be sworn on the ground that he contested the legality of the Committee, and the petitioner replied in the affirmative (R. 178). Counsel for the petitioner who accompanied him to the hearing then presented a statement in written form (R. 178) outlining the legal position of the petitioner (Deft.'s Exh. C, R. 183-187; 109). Petitioner declined to be sworn and to give testimony before the Committee until its legality had been determined (R. 181). The matter was thereafter certified to the United States Attorney for the Southern District of New York (R. 173), and the indictment here followed.

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1. The present Committee is the successor, without change in language or authority, of the Dies and Wood-Rankin Committees of prior Congresses. The functions and powers of the Committee and its predecessors are identical. See H. Res. 282, 75th Cong. 2d Sess.; 83 Cong. Rec. 7568, 7586 (1938); H. Res. 26, 76th Cong. 1st Sess.; 84 Cong. Rec. 1098, 1128 (1939); H. Res. 321, 76th Cong. 3d Sess.; 86 Cong. Rec. 572, 605 (1940); H. Res. 90, 77th Cong. 1st Sess.; 87 Cong. Rec. 886, 899 (1941); H. Res. 420, 77th Cong. 2d Sess., 88 Cong. Rec. 2282, 2297 (1942); H. Res. 65, 78th Cong. 1st Sess.; 89 Cong. Rec. 795, 810 (1943); H. Res. 5, 79th Cong. 1st Sess.; 91 Cong. Rec. 10, 15 (1945).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 9, 1947 (R. 230). On December 23, 1947, Mr. Justice JACKSON extended the time for filing a petition for writ of certiorari until January 20, 1948 (R. 231). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 United States Code, Section 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 United States Code, foll. Section 687).

Statutes and Resolution Involved

(a) Rev. Stats. Sec. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.
>
> * * * * *

(b) Sec. 121(q)(1), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make

from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman and may be served by any person designated by any such chairman or member.

* * * * *

(c) On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

Questions Presented

1. Whether the provisions of Public Law 601 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities abridge petitioner's freedom of speech, press and religion, as well as the right to peaceably assemble and petition for redress of grievances, in violation of the First Amendment to the Constitution of the United States.

2. Whether the authority vested in the House Committee on Un-American Activities by Public Law 601 and House Resolution 5 exceeds the enumerated powers of Congress, in violation of the Ninth and Tenth Amendments to the Constitution of the United States.

3. Whether the contempt statute (Title 2, United States Code, Section 192) as applied to punish the withholding of testimony from the House Committee on Un-American Activities acting under the authority granted by Public Law 601 and House Resolution 5 fails to provide an ascertainable standard of guilt, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

4. Whether the availability and use of process to compel testimony under the standards provided in Public Law 601 and House Resolution 5 violate the provisions of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.

5. Whether Public Law 601 and House Resolution 5 as construed and applied abridge petitioner's freedom of speech, press and religion, as well as the right to peaceably assemble and petition for redress of grievances, in violation of the First Amendment to the Constitution of the United States.

6. Whether the provisions of Public Law 601 and House Resolution 5 as construed and applied exceed the enumerated powers of Congress, in violation of the Ninth and Tenth Amendments to the Constitution of the United States.

7. Whether the provisions of Public Law 601 and House Resolution 5 as construed and applied deprive the petitioner of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

8. Whether Public Law 601 and House Resolution 5 as construed and applied is a bill of attainder, in violation of Article I, Section 9 of the Constitution of the United States.

9. Whether the petitioner may assert the claim that Public Law 601 and House Resolution 5 on their face provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

10. Whether the indictment states an offense within the purview of the contempt statute (Title 2, United States Code, Section 192).

11. Whether the proof adduced at the trial established the commission of an offense.

12. Whether the trial Court erred in its charge to the jury "that the mere fact that no questions were put to him at that time is no defense in this particular indictment" (R. 142, 148); and in further charging the jury that "Intentional violation is sufficient to constitute guilt" (R. 140, 144); and in its refusal to charge the jury that they must find the petitioner not guilty if they were satisfied that he had not been lawfully summoned to the inquiry (R. 144).

Reasons Relied on for Allowance of the Writ

1. This is the first time in which the provisions of the Legislative Reorganization Act of 1946 and House Resolution 5, creating the Committee on Un-American Activities, have been construed by a Circuit Court of Appeals. In construing this statute, a majority of the Court below held that it did not conflict with the Bill of Rights contained in the Constitution. The majority of the Court conceded that the issue raised was "exceedingly important" (R. 212). The dissenting opinion of Judge CLARK took an opposite view of the basic question. Holding that the issue was "one of the more momentous which has come before us" (R. 216), Judge CLARK found that the statute was incompatible with the First Amendment. The construction of the provisions of law creating the House Committee on Un-American Activities is an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court has decided, it is respectfully submitted, a federal question in a way probably in conflict with applicable decisions of this Court. The statute authorizes inquiry into "propaganda" which is "un-American," "subversive," or which attacks "the principle of the form of government as guaranteed by our Constitution." It authorizes, therefore, a sweeping inquiry into ideas, into thought and expression, into opinions and beliefs, all of which, as this Court has on numerous occasions decided, constitute an exercise of freedom of speech, press, religion, assembly or petition for redress of grievances within the protection of the First Amendment.[2] Contrary to the rul-

2. *Stromberg* v. *California*, 283 U. S. 359 (1931); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Bridges* v. *California*, 314 U. S. 252 (1941); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *United States* v. *Ballard*, 322 U. S. 78 (1944); *Thomas* v. *Collins*, 323 U. S. 516 (1945).

ings of this Court, the Circuit Court has upheld a statute whose terms result "in a continuous and pervasive restraint on all freedom of discussion." *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940).

3. The Circuit Court applied the penal statute (Title 2, United States Code, Section 192) to punish the withholding of testimony from the House Committee under its grant of power in a manner contrary to the applicable decisions of this Court. It held, first, that the contention that the contempt statute and authorizing act, when read together, were so vague and indefinite as to be unconstitutional was not available to the petitioner; and, second, that the language of the authorizing statute permits at least the investigation of one specified idea which would have been pertinent to the inquiry. It conceded that "the vice of vagueness in that language, if any, lies in the possibility that it may authorize, though we do not decide that it does so, investigations relating to the advocacy of peaceful changes" (R. 207). The dissenting Judge held that the questions could properly be raised by the petitioner (R. 227); and that the standards provided in the statute were "vague, and doubtful" and should be adjudged insufficient (R. 223). This Court has constantly ruled that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *M. Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). Especially has this Court so held where the vague and indefinite standards contained in the statute permitted the punishment of the use of the freedoms contained in the First Amendment. *Stromberg* v. *California*, 283 U. S. 359 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937). Moreover, this Court has upheld the right of defendants in similar instances to test the

constitutionality of the statute on its face. *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Ex Parte Fisk*, 113 U. S. 713 (1885). The Circuit Court has decided these federal questions, it is respectfully submitted, in a way probably in conflict with applicable decisions of this Court.

4. The Circuit Court held in effect that the Congress possesses a limitless power of inquiry. Judge CLARK, in his dissenting opinion, stated: "If this is legally permissible, it can be asserted dogmatically that investigation of private opinion is not really prohibited under the Bill of Rights" (R. 217). This extraordinary grant of power over the beliefs and ideas of private citizens has never been countenanced by this Court. It places governmental power over and above the Constitution. See *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 61 (1896); *McGrain* v. *Daugherty*, 273 U. S. 135 (1926); *Sinclair* v. *United States*, 279 U. S. 263 (1928); *Jones* v. *Securities Commission*, 298 U. S. 1 (1935). The decision of the Circuit Court on this significant federal question is probably in conflict with applicable decisions of this Court.

5. The decision of the Circuit Court suggesting that the Committee's authority can be saved by a construction narrowing its jurisdiction usurps the legislative function and is contrary to this Court's concept of separability, for the legislation contains no ascertainable standard to which the Committee may be confined by judicial interpretation. *United States* v. *Reese*, 92 U. S. 214 (1875); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). The decision of the Circuit Court is therefore probably in conflict with the applicable decisions of this Court.

6. The construction of the contempt statute (Title 2, United States Code, Section 192) by the Circuit Court appears contrary to the decisions of this Court and the legisla-

tive intent. This Court held in *United States* v. *Murdock*, 290 U. S. 389 (1933) that the statute describes two distinct offenses in the disjunctive: one, a willful default in appearance after summons; two, refusal to answer any question pertinent to the question under inquiry. The petitioner was not charged in the indictment here with the commission of either of these two offenses (R. 5). The prosecutor specifically stated that petitioner was not charged with a willful default (R. 43). Had the petitioner been charged with a willful default in appearance (compare *Townsend* v. *United States*, 95 F. (2d) 352 (Ct. of App. D. C., 1938), *cert. den.* 303 U. S. 664, 1938), the defenses that his default was not willful and that he had not been lawfully summoned to the inquiry would have been available to him. The trial Court in its charge took these issues away from the jury (R. 139-142). See also, *Hartzell* v. *United States*, 322 U. S. 680 (1943); *Screws* v. *United States*, 325 U. S. 91 (1945). Although petitioner was not charged with refusal to answer any specific question pertinent to the question under inquiry, nor did the proof at the trial establish such refusal, he has nevertheless been convicted of the crime of refusing to answer a question pertinent to the inquiry. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362 (1937). This Court has held that it is "incumbent upon the United States to plead and show that the question pertained to some matter under investigation." *Sinclair* v. *United States*, 279 U. S. 263, 296 (1928). The decision of the Circuit Court appears to be in conflict with the decision in the *Townsend* case, *supra*, and with the applicable decisions of this Court.

7. This decision of the Circuit Court raises, as we have heretofore indicated, important questions of federal law which should be settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised

here are ones of substance and general importance relating to the construction and application of a statute under the Constitution which has not been, but should be, settled by this Court.

All of the aforesaid reasons, however, do not manifest entirely the transcending importance of the issue here. The statute here, as applied and construed by the Committee, threatens not only the Constitution, but the American way of life, threatens the substitution of a coerced conformity for unlimited freedom of discussion. The Committee has indicated its preference for the advocates and advocacy of status quo, and regression; it is opposed to the advocacy of social change. As Judge CLARK put it: "It invites and justifies an attempt to enforce conformity of political thinking, to penalize the new and the original, to label as subversive or un-American the attempt to devise new approaches for the public welfare, in short to damn that very kind of initiative in experimentation which has made our democracy grow and flourish" (R. 223). The Committee in actuality has set itself up as a permanent inquisitional body serving as the "grand jury" of America (91 Cong. Rec. 275). It has compiled a blacklist of over 1,000,000 names (77th Congress, 2nd Sess., H. R. 2748) and the Chairman of the Committee recently testified[3] that "it is increasing all the time." It believes it may read the statute and "put whatever interpretation" it sees fit upon it "without any limitation" (75th Cong. 1st Sess., Cong. Rec. 3285). It has attacked countless numbers of Americans, public leaders, statesmen, scientists, teachers, artists, government officials, labor leaders, and plain American men and women as "subversive" and "un-American." Political, religious, and civic organizations of the widest variety have been stamped as "disloyal." Ideas of social change of every conceivable nature have been held by this Committee to be "un-American propaganda." It openly seeks

3. *United States* v. *Penris*, Ct. of App. D. C., June, 1947, No. 9597. Joint Appendix 189.

the persecution of persons whose ideas it opposes, seeks to deprive them of employment in private or public industry, and to impose criminal sanctions wherever possible. The Committee on Un-American Activities has been guilty of illegal searches and seizures (*Reeve* v. *Howe*, 33 F. Supp. 619 (D. C. E. D. Pa., 1940); *United States* v. *Blumberg*, unreported, (D. C. Dist. of Col., 1940, Cr. No. 65,800)). It has been guilty of unlawful arrests (*United States* v. *Dolson*, unreported, D. C. Dist. of Col., 1946, Cr. No. 65,801), and the initiation of criminal proceedings without regard to the requirements of law (*Ex Parte Frankfeld*, 32 F. Supp. 915, D. C. Dist. of Col., 1940). It has conducted its hearings as if they were criminal trials with utter disregard for elementary rules of impartiality and fairness, and without providing a single procedural safeguard which the law traditionally provides for accused persons. Much of the aforesaid was commented upon by Judge CLARK in his dissenting opinion.

Resistance to this rising tide of political intolerance and hysteria has grown. At least twenty-six persons already face imprisonment or trial for their opposition to this Committee. The Committee was condemned by important segments of the public press, here and abroad, during its recent inquiry into the motion picture industry. Its activities have been decried by countless public spirited citizens and organizations. Nevertheless, it continues on its course, threatening further inquiries into the beliefs and opinions of the foreign born, the Negro people, our educational institutions, the trade union movement, and other spheres of American life (Herald Tribune, January 8, 1948).

This Court is the last remaining constitutional protection against these assaults upon civil liberty. If the imprimatur of approval is placed upon this Committee, the Bill of Rights will become only a series of meaningless phrases.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

January, 1948.

LEON JOSEPHSON,
Petitioner.

SAMUEL A. NEUBURGER,
BARENT TEN EYCK,
Attorneys for the Petitioner.

SAMUEL ROSENWEIN,
Of Counsel.

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UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 190-194) and the opinion of the Circuit Court (R. 201-230) are unreported.

Jurisdiction

The basis for this Court's jurisdiction are set forth in the petition.

Specifications of Errors

1. The Circuit Court erred in holding that Public Law 601 and House Resolution 5 on their face, and as applied and construed, did not deprive petitioner of rights secured to him by the provisions of the First, Fourth, Fifth, Sixth,

Ninth and Tenth Amendments to the Constitution, as well as Article 1, Section 9 of the Constitution.

2. The Circuit Court erred in holding that the petitioner may not assert the claim that Public Law 601 and House Resolution 5 provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution.

3. The Circuit Court erred in failing to reverse the conviction of the petitioner upon the grounds that the indictment failed to state an offense against the laws of the United States; that the proof failed to establish the commission of such an offense; and that the charge of the trial Court was erroneous.

The specifications of errors are detailed in the questions presented in the petition.

Summary of Argument

Public Law 601 and House Resolution 5 authorize a limitless inquiry into the propagation of ideas. The main traditions of American history, legal and political, are freedom of ideas, freedom of speech and press, of religion, of proposal of change, of independent intellectual self-assertion unrestricted by governmental action. The statute here results in a continuous restraint upon all freedom of discussion. Governmental inquiry into ideas and governmental classification of ideas are as much abridgements of the freedoms guaranteed by the Constitution as direct prohibitions. The "clear and present danger" doctrine is not a limitation upon the First Amendment. It is a "working principle" to determine the appropriate area where governmental power may impinge, and the area which is free from all governmental intrusion. It is in the realm of action, of unlawful conduct, that government may operate. It possesses no power to intrude into the domain

of ideas and beliefs. The statute here affects precisely the area which the Constitution protects from governmental action. There is no possibility of sustaining the Committee's authority by judicial construction for it would entail the writing of an entirely different enactment. The Circuit Court appears to attribute powers to the Congress nowhere contained in the Constitution. The language of the authorizing statute is vague and undefined. It provides no explicit standards. This Court has always held that penal statutes, especially in the areas of opinion and belief, will not be upheld when they provide no ascertainable standard of guilt. The petitioner may press this issue. The statute as applied and construed violates the Bill of Rights. The use of process to compel testimony without adequate foreknown standards for the inquiry, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. The Committee, acting under its unlimited authority of inquiry may, and does, impose control over thought and expression. The indictment and proof failed to establish the commission of an offense within the purview of Title 2, United States Code, Section 192. The charge of the trial Court was erroneous.

ARGUMENT

I

The provisions of the Legislative Reorganization Act of 1946 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities are unconstitutional.

(a) "Legislatures have no right to set up an inquisition, and examine into the private opinions of men" (Letter of Oliver Ellsworth to The Connecticut Courant, December 17, 1787 in Scott, The Federalist and other Con-

temporary Papers on the Constitution of the United States (1894), p. 583). The view that freedom of thought and expression unrestricted by governmental action was the essence of liberty found common acceptance by the founding fathers. The men who read the works of Tom Paine as they fought a despotic king believed that the dissemination of ideas, propagandizing by speech or press was a liberty which should be protected from governmental infringement "because they knew of no other way by which free men could conduct representative democracy," *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945). They understood that freedom of thought and speech was "the matrix, the indispensable condition of nearly every other form of freedom," *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937). The authority of the Declaration of Independence rested on those "harmonizing sentiments" of the day (Writings of Thomas Jefferson (Ed. 1869), VIII, p. 407). Those feelings arose, not alone from the readings of Aristotle, Cicero, Locke, Sidney, etc., but out of the bitter experiences suffered by the colonists at the hands of the Royal and State governments (Warren, C. Congress, the Constitution and the Supreme Court (1935), p. 81).

The Constitution was intended to devise a form of government in which political power would cease to be arbitrary and excessive by being strictly limited in scope. As originally adopted it contained no Bill of Rights, this out of fear that any enumeration of freedoms would by implication be construed to exclude others not mentioned. "For why declare that things shall not be done which there is no power to do?" The Federalist, Number 84 (Heritage Press, 1945), page 576.

The belief in the power of reason as applied through unrestricted public discussion is indelibly marked in American history. It was evidenced in the struggle of the people led by Jefferson and Madison against the Alien and Sedition Laws (Bassett, J. S., *The Federalist System* in The

American Nation (1906), Vol. XI). A learned author writes that only with the election of Jefferson in 1800 could it be stated "that the real American Revolution had triumphed," Bowers, C. G., *Jefferson and Hamilton* (N. Y. 1925), page 510. It was evidenced in the struggles of the abolitionists prior to the Civil War; in the struggles against the Palmer Raids of the 1920's (Report upon the Illegal Practices of the United States Department of Justice, Washington, D. C., National Popular Government League, May, 1920); in the struggles against "criminal syndicalism" laws and "loyalty oaths" which followed in the backwash of World War I.

The main traditions of American history, therefore,—of our way of life—are freedom of speech, and of the press, of religion, of proposal of change, of independent intellectual self-assertion. Whatever intrusions there have been upon these liberties, "the claims of freedom have even more constantly asserted themselves," Cheney, E. P., *Freedom and Restraint* in Annals of the Academy of Political and Social Science (1938), Volume 200, page 4.

(b) The statute here, authorizing as it does an inquiry into the "extent, character and objects of un-American propaganda activities in the United States" constitutes in reality a limitless inquiry solely into opinion and belief. As Judge CLARK notes: ". . . neither the legislative authority nor the actions pursuant to it suggest or permit any limitations on the investigation of the spoken or written word" (R. 221). The majority opinion concedes that such a conclusion is possible (R. 207). The character of the evil inherent in such sweeping governmental inquisition is no different from that contained in the licensing and penal statutes which this Court has stricken down (*Thornhill* v. *Alabama*, 310 U. S. 88, 1940). The statute "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" (*supra*, p. 98).

(c) In a line of cases from *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880) to *Jones* v. *Securities Commission*, 298 U. S. 1 (1935), this Court has held that governmental inquiry into thought and expression constitutes official action, as burdensome as direct prohibition (see, particularly, *Sinclair* v. *United States*, 279 U. S. 263 (1928) and *United States* v. *Ballard*, 322 U. S. 78, 1944). The Circuit Court's view that the inquiry may be sustained so long as legislation restricting civil liberties is not enacted is, therefore, it is respectfully submitted, erroneous. Governmental inquiry into speech and governmental classification of speech are themselves abridgements of speech (*United States* v. *Ballard*, 322 U. S. 78 (1944); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Thomas* v. *Collins*, 323 U. S. 516 (1945)).

(d) The "clear and present danger" doctrine enunciated by this Court is not, as the majority opinion of the Circuit Court appears to indicate, a limitation upon the First Amendment. The First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be," *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). The clear and present danger doctrine is a "working principle" to determine where one domain begins and the other ends. *Bridges* v. *California*, 314 U. S. 252 (1941). The statute here is not directed against the domain of unlawful acts and conduct (*Thornhill* v. *Alabama*, 310 U. S. 88, 104, 1940). It is pointed at the domain of belief and opinion, sweeping into its orbit every idea of social, economic and political change. Into this area, government may not intrude (*Thomas* v. *Collins*, 323 U. S. 516, 529, 1945).

(e) The peripheral reasons advanced by the Circuit Court to sustain the statute are, it is respectfully submitted, without validity. The Committee's authority cannot be saved by judicial construction. To do so would usurp the legislative function (*United States* v. *Reese*, 92 U. S. 214, 1876), entailing as it would the writing of an entirely

different enactment. The suggestion that the power to investigate is broader than the power to legislate means only that a lawful inquiry may be as detailed and searching as human ingenuity will permit. Legislation, and inquiry, however, have limits marked by the Constitution (*Jones* v. *Securities Commission*, 298 U. S. 1, 1935). The Circuit Court suggests that the Committee may investigate opinions and beliefs in order to determine "how far it can go before it transgresses the boundaries established by the Constitution" (R. 214). An alleged lawful end cannot be accomplished by unconstitutional means. A legislature may not abridge by inquiry a citizen's private beliefs in order to determine whether it should abridge the citizen's private beliefs by legislation (*Sinclair* v. *United States*, 279 U. S. 263, 293, 1929). The Circuit Court believes "exposure" of ideas is salutary. The testing of ideas in the free market place of thought and expression is the essence of our constitutional system. Compulsory exposure of opinions and beliefs is unknown to it (*West Va. State Board of Education* v. *Barnette*, 319 U. S. 624, 1943). There are not involved here inquiries of a census taker, statements of an applicant for second-class mailing privileges, or other reports and statements of a similar character. We deal here with the compulsory disclosure of ideas, opinions and beliefs. There is no reason to suppose that a decision invalidating the statute here will frustrate lawful legislative inquiries. To enforce the Bill of Rights today "is not to choose weak government over strong government" *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943). As Judge CLARK stated: "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse" (R. 230).

(f) The contempt statute punishes only the withholding of pertinent testimony. The vague language of the authorizing statute makes it impossible to determine what is

or is not pertinent to the Committee's jurisdiction. The disagreement among the judges of the Circuit Court on the meaning of its terms emphasizes the issue. The words "subversive" or "un-American" do not have any technical or other special meaning; no well-settled common law meaning (compare, *Connally* v. *General Construction Co.*, 269 U. S. 385, 1926). Resort to dictionary definitions, the statute itself, the construction by the Committee, the construction by the Congress all are fruitless sources of inquiry when it comes to determining what the meaning of the epithets attached to the word "propaganda" signify. The Circuit Court infers that "a man's fate depends on his estimating rightly" (R. 207). Even in the realm of unlawful conduct, a statute must nevertheless contain explicit standards (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 1939); more so in the area of speech, beliefs, ideas, principles and doctrines. The statute here "amounts merely to a dragnet which may enmesh anyone" who advocates social change, no matter how significant or insignificant that change may be (*Herndon* v. *Lowry*, 301 U. S. 242, 263, 1937). That the petitioner may press this issue is well established (*Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Ex Parte Sawyer*, 124 U. S. 200 (1888); *Ex Parte Rowland*, 104 U. S. 604 (1882); *Ex Parte Fisk*, 113 U. S. 713 (1885). Nor is there any available remedy to judicially test the validity of process issued by the Committee (compare, *Yakus* v. *United States*, 321 U. S. 414, 437, 1944).

(g) The statute as applied and construed violates the Bill of Rights. The consequences which flow from the arbitrary invasion by government into constitutionally protected freedoms are best exemplified in the conduct of the Committee. The Committee's unlimited authority of inquiry enables it, and it does, impose control over thought

and expression. Its avowed primary function is the "exposure" of ideas—in reality, the imposition of a political censorship of all opinion and expression (H. R. Rep. No. 2, 76th Cong., 1st Sess. 13 (1939); H. R. Rep. No. 1, 77th Cong., 1st Sess. 24 (1941); H. R. Rep. No. 2742, 79th Cong., 2d Sess., 16 (1947)). It suppresses ideas by "blacklisting" the ideas (H. R. 2, 76th Cong., 1st Sess., Jan. 1939; H. R. 2233, 79th Cong., 2d Sess., 1947) and by "blacklisting" the individuals and organizations who espouse them (H. R. 2748, 77th Cong., 2d Sess., 1941). It has openly stated its purpose and attempts to eliminate from both public and private employment all persons whose ideas it condemns (9 Hearings 5447 (1939); Note, p. 418). Such avowed function of the Committee violates Article I, Section 9 of the Constitution for its construction of the statute renders the law a bill of attainder (compare *United States* v. *Lovett*, 328 U. S. 303, 1946). A leading member of the Committee, John E. Rankin, stated: "I serve notice on the un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times" (91 Cong. Rec. 275, 1945). It has officially attributed its compilation of its blacklist to its subpoena powers (H. R. Rep. 2748, 77th Cong., 2d Sess., 1943, p. 213). The availability and use of process to compel testimony, without adequate, foreknown standards for the inquiry, violate the Fourth Amendment's prohibition of unreasonable searches and seizures (*Jones* v. *Securities Commission*, 298 U. S. 1, 1935). The Courts have had occasion to comment upon the illegal means employed by the Committee (*Reeve* v. *Howe*, 33 F. Supp. 619, D. C. E. D. Pa., 1940; *United States* v. *Blumberg*, unreported, D. C. Dist. of Col., 1940, Cr. No. 65,800; *United States* v. *Dolson*, unreported, D. C. Dist. of Col., 1946, Cr. No. 65,801; *Ex Parte Frankfeld*, 32 F. Supp. 915, D. C. Dist. of Col., 1940). It conducts its hearings like a criminal trial, declaring in advance what persons, ideas and groups it believes to be evil; presenting witnesses to support its "views" or "accu-

sations"; calling upon citizens under oath to deny or affirm the "accusations," and then calling, by way of judgment, for the prosecution and persecution of persons and ideas whom it believes should be swept from the scene—all of this without any of the procedural safeguards to which Judge CLARK referred in his opinion (R. 228). "Civilized standards of procedure and evidence" are unknown to the Committee (compare *McNabb* v. *United States*, 318 U. S. 332, 340, 1943). This Court has said (*Jones* v. *Securities Commission*, 298 U. S. 1, 27, 1936):

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

II

The indictment and proof failed to establish the commission of an offense within the purview of Title 2, United States Code, Section 192. The charge of the trial Court was erroneous.

In *Murdock* v. *United States*, 290 U. S. 389 (1933), this Court held that the contempt statute describes two distinct offenses in the disjunctive. One offense is a willful default in appearance after lawful summons. The other offense is a refusal to answer any question pertinent to the question under inquiry after appearance. The indictment does not charge the commission of either of these two offenses (R. 5).

(a) The prosecutor specifically stated that petitioner was not charged with a willful default (R. 43). Yet, in *Townsend* v. *United States*, 95 F. (2d) 352, 357 (Ct. of App. D. C., 1938), *cert. den.* 303 U. S. 664, 1938), the withholding of testimony after appearance was held to constitute a willful default within the purview of the first section of the contempt statute. Had this charge been laid against petitioner, he would have had available to him the defenses that his default was not willful and that he had not been lawfully summoned to the inquiry. The trial Court in its charge removed these issues from the jury (R. 139-142); the Circuit Court regarded the allegation of "lawful summons" in the indictment as surplusage and upheld the failure of the trial Court to submit the issue to the jury (R. 204). These rulings, it is respectfully submitted, were substantially erroneous for they virtually deprived the petitioner of a jury trial. Especially was this true on the issue of willfulness. This case is unlike *Fields* v. *United States*, 164 F. (2d) 97 (Ct. of App. D. C., 1947) *cert. den.* January 12, 1948. The authorizing statute here is a vague and undefined resolution empowering the Committee to inquire broadly into propagation of ideas. The defendant challenged the lawfulness of such an inquiry. He justified the withholding of his testimony before the Committee by asserting rights guaranteed to him by the Constitution. In the context of this authorizing enactment (Public Law 601), the application of the contempt statute required a different construction of the word "willful" from the one made in the *Fields* case, and required submission of the issue to the jury. This view is supported by the decisions of this Court in *Hartzell* v. *United States*, 322 U. S. 680 (1944) and *Screws* v. *United States*, 325 U. S. 91 (1945).

(b) The petitioner was not charged with refusal to answer any specific question pertinent to the question under inquiry, nor did the proof at the trial establish such refusal. The Circuit Court's view that some pertinent question

might have been put begs the issue. For if, concededly, no question was put, the United States was unable "to plead and show that the question pertained to some matter under investigation" (*Sinclair* v. *United States*, 279 U. S. 263, 296, 1928), and an offense under the second section of the contempt statute was not established. This in no way frustrates the purpose of the contempt statute. It merely requires that the charge be properly laid under the appropriate section of the statute, so that the accused shall not be deprived of defenses afforded him by law.

Conclusion

The decision of the Circuit Court involves important questions of federal law which have not been, but should be, settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised here are ones of substance and general importance, involving as they do, the construction and application of a statute under the Constitution which affects the entire Nation. Wherefore, the petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit to review its judgment and decree.

Respectfully submitted,

SAMUEL A. NEUBURGER,
BARENT TEN EYCK,
Attorneys for Petitioner.

SAMUEL ROSENWEIN,
Of Counsel.